

IP 01-0140-CR 1 B/F USA v McFadden
Magistrate Kennard P. Foster

Signed on 01/23/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Cause No. IP 01-140-CR-01 (B/F)
)	
DEON McFADDEN,)	
)	
Defendant.)	

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

This matter is before the undersigned U. S. Magistrate Judge pursuant to the Order entered by the Honorable Sarah Evans Barker, Judge, on January 13, 2006, designating this Magistrate Judge to conduct hearings on the Petition for Summons or Warrant for Offender Under Supervision, filed with the Court on January 9, 2006, and to submit to Judge Barker proposed Findings of Facts and Recommendation for disposition under Title 18 U.S.C. §§3401(i) and 3583(e). All proceedings in this matter were held on January 19, 2006 pursuant to Title 18 U.S.C. §3583, and Rule 32.1(a)(1) of the *Federal Rules of Criminal Procedure*. The government appeared by Josh Minkler, Assistant United States Attorney. The defendant appeared in person with William Marsh, for William Dazey, appointed counsel, Office of Indiana Federal Community Defender. Dwight Wharton, U. S. Parole and Probation officer, appeared and participated in the proceedings.

The Court conducted the following procedures in accordance with Rule 32.1(a)(1) *Federal Rules of Criminal Procedure* and Title 18 U.S.C. §3583:

1. That William Dazey, Office of Indiana Federal Community Defender, appointed counsel, was present to represent Mr. McFadden in regard to the Petition for Revocation of Supervised Release.

2. A copy of the Petition for Revocation of Supervised Release was provided to Mr. McFadden and his counsel who informed the Court that they had read and understood the specifications of each alleged violation and waived further reading thereof.

3. Mr. McFadden was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending Petition.

4. That Mr. McFadden would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.

5. That Mr. McFadden had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.

6. That if the preliminary hearing resulted in a finding of probable cause that Mr. McFadden had violated the alleged condition or conditions of supervised release set forth in the Petition, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Barker's designation on January 9, 2006.

7. Mr. McFadden stated his readiness to waive the preliminary hearing regarding the Petition then under consideration. Mr. McFadden then waived, in writing, the preliminary hearing and he was held to answer.

8. The parties stipulated the following in open Court:

(1) Mr. McFadden and the government agreed they were ready to proceed to disposition on the pending Petition to REVOKE Mr. McFadden's supervised release in open Court this date.

(2) Mr. McFadden admitted that he committed the violations of specifications set forth in the Petition to Revoke Supervised Release, filed with the Court on January 9, 2006 as follows:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
1	<p>The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substances, except as prescribed by a physician.</p> <p>On December 14, 2005, Mr. McFadden's conditions of supervision were modified to include up to 120 days residency at the Volunteers of America Community Corrections Center due to ongoing marijuana usage (please see Request for Modifying the Conditions of Supervision dated 12/9/05). The designation process was halted in light of his continued noncompliance as reported below.</p> <p>On November 28, 2005, the defendant submitted his first negative urine sample following a sample that was positive for marijuana. On December 11, 2005, he submitted a urine sample that was dilute. On December 19 and 27, 2005, Mr. McFadden submitted urine samples that tested positive for marijuana. On January 6, 2006, he reported to the probation officer as instructed and admitted ongoing use of marijuana. He stated he last ingested marijuana on January 4, 2006, despite warnings that ongoing use would result in a warrant request followed by a revocation hearing. Laboratory results confirmed his admitted usage.</p>

(4) Mr. McFadden has a relevant criminal history category of I. *See*, U.S.S.G. §7B1.4(a).

(5) The most serious grade of violation committed by Mr. McFadden constitutes a Grade C violation, pursuant to U.S.S.G. §7B1.1(b).

(6) Pursuant to U.S.S.G. §7B1.4(a) upon revocation of supervised release the range of imprisonment applicable to Mr. McFadden is 3-9 months.

(7) The parties agree that the appropriate disposition for Mr. McFadden's violation of the conditions of supervised release is 7 months in the custody of the Attorney General, which includes the remainder of the 120 days he was to serve at the Volunteers of America. It is recommended Mr. McFadden serve his sentence at the Terre Haute, Indiana Camp. After service of his sentence, he will not be subject to supervised release.

8. The Court then placed Mr. McFadden under oath and inquired directly of him whether he admitted committing violations of supervised release contained in the Petition to Revoke Supervised Release. Mr. McFadden admitted the violations.

The Court, having heard the admissions of the defendant, the stipulations of the parties, and the arguments and discussions on behalf of each party, **NOW FINDS** that the defendant, Deon McFadden, violated the above-delineated conditions of his supervised release. The defendant's supervised release is therefore **REVOKED**, and Deon McFadden is sentenced to seven months in the custody of the Attorney General, which includes the remainder of the 120 days he was previously ordered to serve at the Volunteers of America. After service of his sentence, Mr. McFadden will not be subject to supervised release.

The Magistrate Judge recommends that Mr. Wharton, U. S. Parole and Probation officer, prepare for submission to the Honorable Sarah Evans Barker, as soon as practicable, a supervised release revocation judgment, in accordance with these findings of facts, conclusions of law and recommendation.

Counsel for the parties and Mr. McFadden stipulated in open Court waiver of the following:

1. Notice of the filing of the Magistrate Judge's Report and Recommendation;
2. Objection to the Report and Recommendation of the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §636(b)(1)(B); Rule 72.b, *Federal Rules of Civil Procedure*, and S.D.Ind.L.R.72.1(d)(2), *Local Rules of the U. S. District Court for the Southern District of Indiana*.

Counsel for the parties and Mr. McFadden entered into the above stipulations and waivers after being notified by the undersigned Magistrate Judge that the District Court may refuse to accept the stipulations and waivers and conduct a revocation hearing pursuant to Title 18 U.S.C. §3583 *et seq.* and Rule 32.1 of the *Federal Rules of Criminal Procedure* and may reconsider the Magistrate Judge's Report and Recommendation, including making a *de novo* determination of any portion of the Report or specified proposed findings or recommendation upon which he may reconsider.

WHEREFORE, the U. S. Magistrate Judge **RECOMMENDS** the Court adopt the above report and recommendation revoking Mr. McFadden's supervised release and the sentence of seven months in the custody of the Attorney General, which includes the remainder of the 120 days he was previously ordered to serve at the Volunteers of America. After service of his sentence, Mr. McFadden will not be subject to supervised release.

IT IS SO RECOMMENDED this 23rd day of January, 2006.

Kennard P. Foster, Magistrate Judge
United States District Court

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